STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Cynthia Diane Stephens, Joel P. Hoekstra, and Patrick M. Meter

PEOPLE OF THE STATE OF MICHIGAN,	Supreme Court No. 150994
Plaintiff-Appellee,	Court of Appeals No. 314564
v	Calhoun County Circuit Court No. 2001-004547-FC
LORINDA IRENE SWAIN,	
Defendant-Appellant.	

_____/

BRIEF ON APPEAL OF ATTORNEY GENERAL BILL SCHUETTE AS AMICUS CURIAE

ORAL ARGUMENT REQUESTED

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STATEMENT OF QUESTIONS PRESENTED

The Court's order granting leave to appeal presented the following questions:

1. Whether the test set forth in *People v Cress*, 468 Mich 678, 692 (2003), for determining whether a defendant is entitled to a new trial based on newly discovered evidence applies in determining whether a second or subsequent motion for relief from judgment is based on "a claim of new evidence that was not discovered before the first such motion" under MCR 6.502(G)(2).

2. Whether the defendant is entitled to a new trial premised on the prosecution's violation of the rule set forth in *Brady v Maryland*, 373 US 83 (1963).

3. By what standard(s) Michigan courts consider a defendant's assertion that the evidence demonstrates a significant possibility of actual innocence in the context of a motion brought pursuant to MCR 6.502(G), and whether the defendant in this case qualifies under that standard.

4. Whether the Michigan Court Rules, MCR 6.500, *et seq*. or another provision, provide a basis for relief where a defendant demonstrates a significant possibility of actual innocence.

5. Whether, if MCR 6.502(G) does bar relief, there is an independent basis on which a defendant who demonstrates a significant possibility of actual innocence may nonetheless seek relief under the United States or Michigan Constitutions.

6. Whether the defendant is entitled to a new trial pursuant to MCL 770.1.

STATUTES INVOLVED

MCL 769.26, which addresses the granting of a new trial, provides as follows:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

MCL 770.1, which also addresses the granting of a new trial, provides as follows:

> The judge of a court in which the trial of an offense is held may grant a new trial to the defendant, for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, and on the terms or conditions as the court directs.

MCL 770.2, which addresses the timing of motions for a new trial, provides as follows:

> (1) Except as provided in section 16, in a case appealable as of right to the court of appeals, a motion for a new trial shall be made within 60 days after entry of the judgment or within any further time allowed by the trial court during the 60-day period.
>
> (2) In a misdemeanor or ordinance violation case appealable as of right from a municipal court in a city that adopts a resolution of approval under section 23a of the Michigan uniform municipal court act, 1956 PA 5, MCL 730.523a, or from a court of record to the circuit court, a motion for a new trial shall be made within 20 days after entry of the judgment.
>
> (3) In a misdemeanor or ordinance violation case appealable de novo to the circuit court, a motion for a new trial shall be made within 20 days after entry of the judgment.
>
> (4) If the applicable period of time prescribed in subsection (1) or (2) has expired, a court of record may grant a motion for a new trial for good cause shown. If the applicable time period prescribed in subsection (3) has expired and the defendant has not appealed, a municipal court may grant a motion for new trial for good cause shown.

RULES INVOLVED

Michigan Court Rule 6.431 provides, in relevant part, as follows:

> (A) Time for Making Motion.
>
> > (1) A motion for a new trial may be filed before the filing of a timely claim of appeal.
> >
> > (2) If a claim of appeal has been filed, a motion for a new trial may only be filed in accordance with the procedure set forth in MCR 7.208(B) or the remand procedure set forth in MCR 7.211(C)(1).
> >
> > (3) If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion for a new trial may be filed within 6 months of entry of the judgment of conviction and sentence.
> >
> > (4) If the defendant is no longer entitled to appeal by right or by leave, the defendant may seek relief pursuant to the procedure set forth in subchapter 6.500.
>
> (B) Reasons for Granting. On the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice. The court must state its reasons for granting or denying a new trial orally on the record or in a written ruling made a part of the record.

Michigan Court Rule 6.502(G) provides as follows:

> (G) Successive Motions.
>
> > (1) Except as provided in subrule (G)(2), regardless of whether a defendant has previously filed a motion for relief from judgment, after August 1, 1995, one and only one motion for relief from judgment may be filed with regard to a conviction. The court shall return without filing any successive motions for relief from judgment. A defendant may not appeal the denial or rejection of a successive motion.
> >
> > (2) A defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion. The clerk shall refer a successive motion that asserts that one of these exceptions is applicable to the judge to whom the case is assigned for a determination whether the motion is within one of the exceptions.

Michigan Court Rule 6.508(D) provides as follows:

> (D) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion
>
> > (1) seeks relief from a judgment of conviction and sentence that still is subject to challenge on appeal pursuant to subchapter 7.200 or subchapter 7.300;
> >
> > (2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision;
> >
> > (3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates
> >
> > > (a) good cause for failure to raise such grounds on appeal or in the prior motion, and
> > >
> > > (b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,
> > >
> > > > (i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;
> > > >
> > > > (ii) in a conviction entered on a plea of guilty, guilty but mentally ill, or nolo contendere, the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand;
> > > >
> > > > (iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;
> > > >
> > > > (iv) in the case of a challenge to the sentence, the sentence is invalid.
> > >
> > > The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.

INTRODUCTION

Trial by jury is the best mechanism our country has developed for determining whether a criminal defendant is innocent or guilty. At trial, the presumption of innocence and all of the guarantees of the U.S. Constitution protect the criminal defendant from an unfair conviction. At trial, due process requires the prosecution to prove each element of the crime beyond a reasonable doubt.

If a defendant is convicted at trial, things change. The presumption of innocence ends. Indeed, on collateral review, it is "the defendant" who "has the burden of establishing the relief requested"—she must overcome the fact a jury found her guilty beyond a reasonable doubt. MCR 6.508(D). That burden is, and should be, a high one, for courts should not lightly second guess decisions made through the trial process.

Just as the trial is meant to be the central mechanism for ascertaining guilt or innocence, the appeal is meant to be the primary mechanism for reviewing claims that the protections of the Constitution have not been respected. In contrast, the motion-for-relief-from-judgment provisions of the Michigan Court Rules (subchapter 6.500) are meant to play a limited role. And within that already limited role, MCR 6.502(G)(1) provides that "one and only one motion for relief from judgment may be filed with regard to a conviction." Both the direct-review process and these rules reflect an important principle for criminal justice: finality.

MCR 6.502(G)(2) provides two exceptions that allow a second motion for relief: "[1] a retroactive change in law that occurred after the first motion for relief

from judgment or a [2] claim of new evidence that was not discovered before the first motion." MCR 6.502(G)(2). Swain seeks to fall within this second exception.

Swain's efforts fail. To the extent she is relying on a freestanding claim of actual innocence based on new evidence, she cannot establish an entitlement to relief under MCR 6.508(D)—through which all motions for relief for judgment, including successive motions, must pass. Under Rule 6.508(D), she must satisfy the four-part test this Court has applied for more than a century. See, e.g., *People v Cress*, 468 Mich 678, 692 (2003); see also MCL 770.1 (authorizing new trials "when it appears to the court that justice has not been done"). And to show under *Cress* that a different result would be probable on retrial, a convicted defendant must show that it is more likely than not that no reasonable jury could find her guilty beyond a reasonable doubt. In short, to overcome the jury verdict against her, she must prove not just that reasonable doubt exists, but rather that she is actually innocent. She has not made that showing here.

To the extent she seeks relief based on a trial error—she alleges that the prosecution suppressed evidence in violation of *Brady v Maryland*, 373 US 83 (1963)—her claim fails because, as the Court of Appeals correctly recognized, she has no new evidence that was suppressed.

Swain's conviction, secured by a constitutionally fair trial, should be upheld.

STATEMENT OF FACTS

The Attorney General joins the statement of facts set out in the prosecutor's brief.

STANDARD OF REVIEW

Appellate courts review a trial court's denial of a motion for relief from judgment for abuse of discretion and its findings of fact for clear error. *People v Swain*, 288 Mich App 609, 628 (2010). Questions of law are reviewed de novo. *People v Hawkins*, 468 Mich 488, 496 (2003). And both court rules and statutes must be interpreted according to their plain language. *McAuley v Gen Motors Corp*, 457 Mich 513, 518 (1998).

ARGUMENT

I. The *Cress* standard applies to all motions for relief for judgment, including successive motions. (Question 1)

Subchapter 6.500 of the Michigan Court Rules governs motions for relief for judgment, addressing both first motions and any successive ones. It specifically requires that *all* such motions satisfy the requirements of MCR 6.508(D). Rule 6.508(D), after all, sets out the requirements for granting relief on a motion for relief for judgment. It requires that a defendant satisfy "the burden of establishing entitlement to the relief requested" in the motion and provides that "[t]he court *may not grant relief* to the defendant if *the motion*" fails any of the three bars set out in subsections (D)(1), (D)(2), and (D)(3). MCR 6.508(D) (emphasis added). And lest there be any suggestion that "the motion" somehow refers only to a *first* motion for

relief, subsection (D)(3) makes clear that it governs successive motions too, because it refers to grounds for relief that "could have been raised . . . in a *prior motion under this subchapter*" and to "failure to raise such grounds . . . in the *prior motion*." MCR 6.508(D)(3) & (D)(3)(a) (emphasis added). In short, the text is clear: all motions for relief from judgment must pass through the crucible of MCR 6.508(D).

Swain argues that there is no diligence requirement applicable to her *Brady* claim because she is bringing a successive motion, rather than in a first motion for relief from judgment. (Swain's Br, p 20.) In her view, because she is bringing a successive motion under MCR 6.502(G)(2), she should not have to show diligence: "MCR 6.502(G)(2)'s wording, 'new evidence that ***was not*** **discovered** before the first such motion,' is simply not compatible with the additional requirement of *Cress*, which demands a showing that the evidence ***could not have been*** **discovered** before the prior motion." (Swain's Br, p 20.) The problem with this argument is that it ignores the plain language of both MCR 6.502 and 6.508.

First, Rule 6.502 itself starts by explaining what a motion for relief for judgment is, MCR 6.502(A) (entitled "Nature of Motion"), and requires that any motion for relief for judgment "must specify all of the grounds for relief which are available to the defendant and of which the defendant has, *or by the exercise of due diligence, should have* knowledge," *id.* The diligence requirement is therefore an inherent limitation on what a motion for relief from judgment is.

Second, Rule 6.508(D)(3) bars second or successive motions for relief from judgment if the motion "alleges grounds for relief . . . which *could have been raised*

. . . *in a prior motion under this subchapter*." MCR 6.508(D)(3) (emphasis added). This shows that Rule 6.508(D)(3)'s language ("could have been raised") applies to *all* motions, including successive motions (i.e., motions brought after a prior motion) filed under Rule 6.502(G)(2). And as Swain acknowledges, the *Cress* standard recognizes that the "could have been raised" language imposes a diligence requirement. (Swain's Br, p 20.)

Third, additional language in Rule 6.508(D)(3) further proves this point. Subsection (D)(3)(a) allows a defendant to allege grounds for relief that could have been raised in a prior motion if she can demonstrate "good cause for the failure to raise such grounds . . . *in the prior motion*." MCR 6.508(D)(3)(a) (emphasis added). A defendant who failed to exercise diligence in locating evidence will usually not be able establish that she had "good cause" for failing to raise the evidence in the prior motion.

This straightforward reading of the text of the Rules is consistent with *Cress* itself. In *Cress,* this Court applied the test for newly discovered evidence to the motion for relief from judgment at issue in that case. 468 Mich at 680 ("We granted leave to appeal to consider whether the trial court abused its discretion in denying defendant's *motion for relief from judgment* on the basis of a new, third-party confession.") (emphasis added); see also *People v Grissom*, 492 Mich 296, 312 (2012) (reviewing the Court of Appeals' affirmance of "the trial court's denial of defendant's motion for relief from judgment"). And *Cress* requires a first motion based on new evidence to satisfy its four-part test—"a defendant must show that: (1) 'the evidence

itself, not merely its materiality, was newly discovered'; (2) 'the newly discovered evidence was not cumulative'; (3) 'the party could not, using reasonable diligence, have discovered and produced the evidence at trial'; and (4) the new evidence makes a different result probable on retrial." 468 Mich at 692. Indeed, it would make little sense to apply one test to determine if something is new evidence under Rule 6.508(D) and a different test to determine if the same evidence constituted new evidence under Rule 6.502(G)(2), especially given that all motions must satisfy Rule 6.508(D).

The rules in subchapter 6.500 are designed to work together as a comprehensive whole, and Rules 6.502(G)(2) and 6.508(D)(3) can easily be read together. A defendant who wants to "file a second or subsequent motion based on . . . a claim of new evidence that was not discovered," MCR 6.502(G)(2), cannot receive relief "if the motion . . . alleges grounds for relief . . . which could have been raised . . . in a prior motion under [subchapter 6.500]," MCR 6.508(D)(3). Swain quibbles with this cohesive system by pointing to the word "file," arguing that she can at least *file* successive motions based on evidence that she could have discovered sooner, had she exercised diligence, even though the courts may not grant relief on the motion. (Swain's Br, p 21.) But it makes little sense to require courts to hear claims that by definition could never succeed.

Swain is also wrong to assert that applying *Cress* to successive motions would eliminate the actual-innocence exception set out in Rule 6.508(D)(3). (Swain's Br, p 21.) For one, the *Cress* test governing *new* evidence would not apply to

circumstances implicating (D)(3)'s restriction on *old* evidence (i.e., evidence that could have been brought before). Instead, a successive motion relying on new evidence purporting to show actual innocence *apart from any trial error* would have to satisfy *Cress*. But just as successive motions *asserting a trial error* are bound by the requirements of (D)(3)—such as its limitation excluding evidence that could have been discovered sooner—so too do successive motions asserting a trial error benefit from the actual-innocence exception to the good-cause requirement. Under MCR 6.508(D)(3), a defendant may rely on "old" evidence if there is good cause for her failure to raise the old evidence as a ground for relief in the prior motion, but only if she *also* satisfies the requirement of (D)(3)(b)—that is, only if she suffered "actual prejudice from the alleged irregularities that support the claim for relief." In other words, her claim must show actual prejudice resulting from some trial error. This too is plain from the text of the rule: each enumerated category of "actual prejudice" expressly requires it to have resulted from some "irregularit[y]"—from an "alleged error," MCR 6.508(D)(3)(b)(i), from a "defect in the proceedings," MCR 6.508(D)(3)(b)(ii), or from a particularly offensive "irregularity," MCR 6.508(D)(3)(b)(iii). As a result, a defendant filing a successive motion can assert a claim for actual innocence only if the claim results from some trial error.

II. No *Brady* violation occurred. (Question 2)

Brady v Maryland "hold[s] that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith

or bad faith of the prosecution." 373 US 83 (1963); see also *People v Chenault*, 495 Mich 142, 155 (2014) (the test for a *Brady* violation is "(1) the prosecution has suppressed evidence; (2) that is favorable to the accused: and (3) viewed in its totality, is material"). A valid *Brady* claim therefore necessarily involves new evidence—evidence that was suppressed, such that the defendant did not discover it. E.g., 6 LaFave Crim. Proc. § 24.3(b) (4th ed.) ("Even undisclosed favorable and material information in the possession of the government is not 'suppressed' in violation of *Brady* if the defendant knew of it or could have obtained it with reasonable effort.").

Because it inherently involves new evidence, a legitimate *Brady* claim is a type of "claim of new evidence," and it therefore can satisfy the requirement of MCR 6.502(G) that the successive motion be based on "a claim of new evidence that was not discovered before the first such motion" (as long as the *Brady* evidence is in fact discovered *after the first motion*). A valid *Brady* claim can also satisfy the requirements of MCR 6.508(D): if it truly is new evidence because it was suppressed, then it is not a ground for relief that "could have been raised" in a prior motion, so Rule 6.508(D)(3) does not bar it. (If, on the other hand, it could have been brought in a prior motion, then a defendant must also clear the "good cause" and "actual prejudice" bars of MCR 6.508(D)(3)(a) & (b).)

But Swain does not have a valid *Brady* claim because the evidence on which she relies is not new evidence. As explained by both the Court of Appeals (Swain App'x, pp 501a–505a) and the Calhoun County prosecutor (Appellee's Br, pp 30–31),

Swain knew at the time of trial that Dennis Book, her former live-in boyfriend, may have had knowledge of the events at issue because he was present in the home during part of the relevant time. Indeed, she "referenced Book in her trial testimony." (Swain App'x, p 501a.) And her efforts to cast as evidence the fact that an unrecorded interview occurred (where Book spoke to a now-deceased detective on the telephone) are meritless. The substance of that call would be hearsay rather than admissible evidence, and Book's alleged willingness to be a witness favorable to the defense is merely a change to his status, not evidence itself. (Swain App'x, p 503a.) In short, a defendant's perception about whether a particular witness or other piece of evidence would be helpful or harmful to the defendant is not itself new evidence; it is a decision relating to trial strategy.

III. The standard for establishing actual innocence based on newly discovered evidence alone is and should be an extraordinarily high standard. (Question 3)

In addition to her *Brady* claim, Swain appears to contend she is actually innocent of the crime. But regardless of whether she seeks relief based on her *Brady* claim or based on some sort of standalone actual-innocence claim, she has not met her burden for relief.

A. Motions for relief for judgment must be narrowly cabined so they do not overwhelm the ordinary process of trial and appeal.

Our criminal-justice system is structured to make the trial the focal point of the process of deciding guilt or innocence. Absent unusual circumstances, the trial

will be "the one and only opportunity" for the parties to present their case. *People v Rao*, 491 Mich 271, 280 (2012). "The guilt or innocence determination in state criminal trials is a decisive and portentous event." *Herrera v Collins*, 506 US 390, 401 (1993) (quotation marks and citations omitted). "Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens." *Id.* Indeed, at trial a criminal defendant can rely on the full panoply of protections established by the federal and state constitutions, including especially a presumption of innocence until proven guilty. *Id.* at 398–399 (listing constitutional provisions ensuring against the risk of convicting an innocent person, including the rights to confrontation, to compulsory process, to effective assistance of counsel, and to a jury trial, and the requirement that the prosecution must disclose exculpatory evidence).

If a criminal defendant is convicted at trial, she is guaranteed "an appeal as a matter of right," Const 1963, art 1, § 20, but she is no longer presumed innocent: "a criminal conviction in Michigan also destroys the presumption of innocence." *People v Peters*, 449 Mich 515, 519 (1995); see also *House v Bell*, 547 US 518, 537 (2006) (recognizing "the presumed guilt of a prisoner convicted in state court"); *Herrera*, 506 US at 399 ("Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears."). On appeal, she may raise any errors that she believes deprived her of a fair trial, and if unsuccessful in persuading the Court of Appeals that her conviction is somehow flawed, she also may petition this Court for review.

Once a defendant has been convicted and has exhausted her direct appeals, society's interest in finality, a principle that is "essential to the operation of our criminal justice system," *Rao*, 491 Mich at 280, arises. Once the state has "afforded a full and fair opportunity to reliably determine guilt and an appeal of right, assisted by constitutionally adequate counsel at public expense, all institutional and public interests support the conclusion that proceedings should come to an end unless the defendant's conviction constituted a miscarriage of justice." *People v Reed*, 449 Mich 375, 381–382 (1995).

This Court has established rules addressing the rare circumstance where there is alleged to be a miscarriage of justice. It adopted these rules to promote society's interest in finality. Before subchapter 6.500 was enacted on October 1, 1989, "the procedure for collateral review of criminal convictions in Michigan did not make any provision for finality of judgments," and "[a]s a consequence, defendants could, and did, repeatedly seek relief without limitation." *Reed*, 449 Mich at 388 (Boyle, J.).

Subchapter 6.500 was designed to change that. Indeed, the draft of what became MCR 6.508 explained that "[t]he collateral postconviction remedy provided by subchapter [6.500] should be regarded as extraordinary." *Id.*, quoting Proposed Rules of Criminal Procedure, 428A Mich 50 (1987). Because the post-judgment rule lacks "any statute of limitations," the remedy it gives—a new trial with its attendant costs—"has the potential for seriously undermining the state's important interest in the finality of criminal judgments." *Reed*, 449 Mich at 388–389. And the

fact that relief under subchapter 6.500 should be a rare event is consistent with the fact that post-conviction petitions "that advance a substantial claim of actual innocence are extremely rare." *Schlup v Delo*, 513 US 298, 321 & n 36 (1995) (identifying only two decisions "from a Court of Appeals in which a petitioner had satisfied any definition of actual innocence").

Further, subchapter 6.500 is the exclusive procedure through which a post-conviction claim can be brought. For instance, if a defendant brings a motion for a new trial after her window for appeal has past, then her claim can proceed only through subchapter 6.500. MCR 6.431(A)(4) ("If the defendant is no longer entitled to appeal by right or by leave, the defendant may seek relief pursuant to the procedure set forth in subchapter 6.500."); MCR 6.501 ("Unless otherwise specified by these rules, a judgment of conviction and sentence. . . not subject to appellate review under subchapters 7.200 or 7.300 may be reviewed only in accordance with the provisions of this subchapter."). That means a delayed motion for a new trial is also subject to the limitations on successive motions found in MCR 6.502(G) and to the requirements in MCR 6.508(D), which apply to all motions for relief from judgment.

B. To obtain relief based on an assertion of actual innocence, a convicted defendant must show that she is innocent, not just that reasonable doubt exists.

A defendant contending she is actually innocent has two avenues under Michigan law for seeking relief. If she asserts a freestanding innocence claim—a claim unconnected to any trial error—then she must show (under the test for newly

discovered evidence) that it is more likely than not that no reasonable jury could convict her beyond a reasonable doubt.

If, on the other hand, she asserts both that she is innocent and that an error tainted her trial, then she must establish that she is entitled to relief based on the underlying trial error (for example, that there was ineffective assistance of counsel or that there was a *Brady* violation). Actual innocence comes into play in this second circumstance only as a mechanism to avoid MCR 6.508(D)(3)'s good-cause requirement. In other words, if the trial error is one that could have been raised in a prior motion, then she must also establish (1) "good cause for [her] failure to raise such grounds," MCR 6.508(D)(3)(a), and (2) "actual prejudice from the alleged irregularities." MCR 6.508(D)(3)(b). But instead of showing good cause, she also may show that there is a significant possibility that she is innocent of the crime. MCR 6.508(D)(3). In the context of a *Brady* violation discovered after a prior motion for relief from judgment, the defendant is necessarily relying on a ground for relief which could *not* have been raised before, so if a *Brady* violation really occurred, she could establish good cause for not raising the suppressed evidence sooner. As a result, she would not need to use actual innocence as a gateway to reaching her claim of a trial error.

In short, for a freestanding innocence claim, she must establish that it is more likely than not that no reasonable jury could convict her beyond a reasonable doubt, but for a *Brady* claim, she simply has to satisfy *Brady*'s requirements. The necessary actual-innocence showing under the first approach is higher than under

the second, as it should be, because it is attempting to overturn a verdict that was not tainted by any error in the proceedings.

1. For a freestanding actual-innocence claim based on newly discovered evidence, a convicted defendant must show that it is more likely than not that no reasonable jury could have convicted her beyond a reasonable doubt.

For a freestanding actual-innocence claim based on newly discovered evidence, the standard is very high. It is "firmly established in our legal system[] that the line between innocence and guilt is drawn with reference to a reasonable doubt." *Schlup*, 513 US at 328, citing *In re Winship*, 397 US 358 (1970) (holding that the Due Process Clause requires "proof beyond a reasonable doubt"). Given this reference point imposed by the federal Due Process Clause, analysis of an actual-innocence claim "must incorporate the understanding that proof beyond a reasonable doubt marks the legal boundary between guilt and innocence." *Schlup*, 513 US at 328 (emphasis added). "The meaning of actual innocence" therefore "does not merely require a showing that a reasonable doubt exists in light of the new evidence, but that no reasonable juror would have found the defendant guilty." *Id.* at 329. In other words, the convicted defendant trying to establish actual innocence as a ground for relief "must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id.* at 328.

This high standard is appropriate because, as noted above, a convicted defendant bringing a motion for relief from judgment no longer is entitled to a presumption of innocence. Quite the contrary, a final conviction resulting from the

trial and appellate process "destroys the presumption of innocence." *Peters*, 449 Mich at 519. This is especially true when the defendant is asserting a standalone innocence claim—that is, one that does not assert that any error at trial violated his constitutional or substantive rights, but rather contends that the jury simply reached the wrong outcome. "In such a case, when a petitioner has been 'tried before a jury of his peers, with the full panoply of protections that our Constitution affords criminal defendants,' it is appropriate to apply an extraordinarily high standard of review." *Schlup*, 513 US at 315–316 (emphasis added; internal quotation marks and citations omitted).

This standard fits with the Court's *Cress* standard. That standard authorizes courts to grant a new trial if the defendant can "show that: (1) 'the evidence itself, not merely its materiality, was newly discovered'; (2) 'the newly discovered evidence was not cumulative'; (3) 'the party could not, using reasonable diligence, have discovered and produced the evidence at trial'; and (4) the new evidence makes a different result probable on retrial." *Rao*, 491 Mich at 279, quoting *Cress*, 468 Mich at 664. Consistent with a freestanding innocence claim, the four-factor *Cress* test does not require that there have been any error in the proceedings; it focuses simply on the existence of new evidence. And the test is often linked to the idea that a court may grant a new trial to prevent a "miscarriage of justice," a concept that includes actual innocence. E.g., *Rao*, 491 Mich at 280–281; *People v Grissom*, 492 Mich 296, 315 (2012); *People v Pizzino*, 313 Mich 97, 110 (1945). The Court has

applied this test "consistently for more than a century." *Grissom*, 492 Mich at 313 (citing *Canfield v City of Jackson*, 112 Mich 120, 123 (1897)).

To the extent that she raises a freestanding actual-innocence claim brought post-conviction, the requirement that "the new evidence makes a different result probable on retrial," *Cress*, 468 Mich at 664, means that the new evidence must make it "more likely than not that no reasonable juror would have convicted the defendant in light of the new evidence," *Schlup*, 513 US at 328.

Swain does not come close to satisfying this standard. For one, as already explained, her evidence is not newly discovered. Both she and her counsel knew at the time of trial that Book had knowledge relating to the disputed events, and nothing the State did prevented her from calling him at trial; if she wanted to put on testimony from him at trial, she could have done so. (Swain's App'x, p 504a–505a.) Instead, she made a strategic decision not call him.

For another, Swain cannot show that any testimony by Book would make a different result probable. In the best-case scenario, he might be able to testify that he never observed her committing the charged sexual misconduct. But as the prosecutor has explained (Appellee Br, pp 27–28), Book did not live with Swain when the abuse began, and when he did live with her, he still was not present at the other location where abuse occurred.

To succeed on a freestanding actual-innocence claim, Swain must do more than undermine the strength of the case against her; she must affirmatively prove she is actually innocent. She has not done that here.

2. When bringing a valid *Brady* claim, which inherently involves new evidence that could not have been raised before, the defendant must satisfy *Brady*'s test.

Relief under MCR 6.508(D) is not limited to claims of actual innocence. Quite the opposite, it exists to provide an avenue for claims of ordinary trial error. If a defendant raises that trial error in a motion for relief for judgment in a circumstance where she could not have raised the error on appeal or in a prior motion, then she does not need to prove cause and prejudice. As already noted, a *Brady* claim is the perhaps unique type of trial error that is inherently based on newly discovered evidence, and a valid *Brady* claim will satisfy the requirements of MCR 6.502(G)(2). So she merely needs to establish "entitlement to the relief requested." MCR 6.508(D). Thus, actual innocence is not a requirement for bringing a claim of a trial error.

Swain falls into this category, but she cannot establish a *Brady* violation (as explained earlier), so she cannot establish an entitlement to relief.

IV. Neither the Michigan Court Rules nor the federal or state constitutions provide a basis for relief for a standalone innocence claim.

A. The Michigan Court Rules do not establish substantive law, so they cannot by themselves provide basis for relief. (Question 4)

The Court has also asked whether the Michigan Court Rules provide a basis for relief where a defendant demonstrates a significant possibility of actual innocence. They do not; the Court Rules are merely rules of procedure, not

substance, and therefore cannot provide a substantive basis for relief independent of some other source of authority.

This Court has repeatedly recognized that it "'is not authorized to enact court rules that establish, abrogate, or modify the substantive law.'" *People v Watkins*, 491 Mich 450, 473 (2012), quoting *McDougall v Schanz*, 461 Mich 15, 27 (1999); see also *People v Glass*, 464 Mich 266, 281 (2001); *Shannon v Ottawa Circuit Judge*, 245 Mich 220, 223 (1928). "Rather, as is evident from the plain language of [article] 6, § 5, this Court's constitutional rule-making authority extends only to matters of practice and procedure." *McDougall*, 461 Mich at 27; Const 1963, art 6, § 5 ("The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state.").

Because the Michigan Court Rules govern only procedure, and may not establish a substantive right, they cannot by themselves provide a basis for relief. Instead, they can only serve as a procedural avenue by which some substantive ground for relief (for example, a constitutional error or a statutory violation) can be vindicated.

Specifically, the language of Rule 6.508(D) requires an assertion of actual prejudice to be based on "irregularities that support the claim for relief," MCR 6.508(D)(3)(b)—that is, the type of prejudice the rule is talking about comes from some error that deprived the defendant of a fair trial. In other words, to satisfy the actual-prejudice prong of (D)(3)(b)—a prong that is not waived by a showing of a significant possibility the defendant is innocent of the crime—the defendant must

show an "error," a "defect in the proceedings," or an "irregularity . . . offensive to the maintenance of a sound judicial process." MCR 6.508(D)(3)(b)(i), (ii), & (iii). And the context—first that the actual-prejudice subrule says nothing about innocence, and second that the very next sentence of (D)(3) itself makes clear that innocence waives only the good-cause requirement—shows that the type of irregularity referenced is an error in the judicial process itself, not an error in the outcome regarding innocence. So MCR 6.508(D)(3) by itself does not allow for an actual-innocence claim that is not linked to an underlying trial error. This means freestanding innocence claims can be brought only under *Cress*'s test for newly discovered evidence.

Swain asserts that MCR 7.316(A)(7) and 7.216(A)(7) "grant the authority to do justice in individual cases"—to exercise "this Court's inherent authority to do what 'ought' to be done." (Swain's Br, p 42). But these rules do not provide the unlimited power Swain envisions.

MCR 7.316(A)(7) provides that "[t]he Supreme Court may . . . enter any judgment or order that ought to have been entered, and enter other and further orders and grant relief as the case may require." MCR 7.216(A)(7) provides similar authority to the Court of Appeals; it provides that "The Court of Appeals may . . . enter any judgment or order or grant further or different relief as the case may require." This Court has relied on MCR 7.316(A)(7) to address a variety of issues, including:

- granting a motion to withdraw as counsel, *Macor v Kowalski*, 742 NW2d 356 (Mich 2007);

- recognizing the Court's power to enforce its own rules, *Bierlein v Schneider*, 474 Mich 989 (2005);
- adding a register of deeds as a defendant, *Cent Ceiling & Partition, Inc v Dep't of Commerce*, 672 NW2d 511 (Mich 2003);
- vacating one of its own opinions and remanding in light of a decision by the U.S. Supreme Court, *Yellow Freight Sys, Inc v State, Dep't of Treasury*, 468 Mich 862 (2003);
- remanding a case to the Court of Appeals as on rehearing granted, *People v Harlan*, 466 Mich 864 (2002);
- awarding wages and tips as a matter of equity, *Sanchez v Lagoudakis*, 458 Mich 704, 726 (1998); and
- reviewing an issue sua sponte, *Caterpillar, Inc v Dep't of Treasury, Revenue Div*, 440 Mich 400, 407 (1992).

This rule thus allows the Court to address procedural issues not otherwise specifically covered by the court rules. But as explained above, court rules cannot "establish, abrogate, or modify the substantive law." *Watkins*, 491 Mich at 473. In short, Rule 7.316(A)(7) does not allow the Court to grant substantive relief that is not otherwise provided by statute or constitutional provision. And while the Court has residual common-law authority, that authority can be superseded by statute, as has occurred here when the Legislature established Michigan's Code of Criminal Procedure. Cf. *People v Reese*, 491 Mich 127, 151 (2012) ("This Court has emphatically stated that once the Legislature codifies a common law crime and its attendant common law defenses, the criminal law of this state concerning that crime 'should not be tampered with except by legislation . . . .' "), quoting *People v Riddle*, 467 Mich 116, 126 (2002); see also *In re Lamphere*, 61 Mich 105, 109 (1886).

The rule does not, as Swain suggests, authorize this Court to do what it thinks "ought" to be done. If that approach were valid, then the Court would be asserting the authority to ignore statutory and even constitutional provisions that stood in the way of the Court's conception of ultimate justice. That view of these rules would authorize a court to act lawlessly by overriding fundamental separation-of-powers principles. This Court is a court of law, not a court of ultimate justice. Indeed, our system provides a separate outlet—the executive's pardon power—for pleas that the law should be set aside or overridden in a particular case. Const 1963, art 5, § 14.

B. Neither this Court nor the U.S. Supreme Court has recognized a standalone constitutional claim for actual innocence, and this case does not require the Court to recognize one. (Question 5)

In *Herrera v Collins*, 506 US 390 (1993), the U.S. Supreme Court rejected a post-conviction standalone actual-innocence claim, i.e., a claim of innocence that was not tied to any allegation of a constitutional violation in the underlying proceeding. After being convicted of murder for shooting a police officer in the head and being sentenced to death, Leonel Herrera sought habeas relief based on affidavits asserting that his deceased brother had been the actual killer. *Id.* at 857. Herrera asserted, like Swain does here (Swain's Br, p 42), that because "he was 'actually innocent' of the murder for which he was sentenced to death, . . . the Eighth Amendment's prohibition against cruel and unusual punishment and the Fourteenth Amendment's guarantee of due process of law therefore forbid his

execution." *Herrera*, 506 US at 393. The Supreme Court rejected his claim for habeas relief.

As for the Eighth Amendment claim, the Court recognized that "the Eighth Amendment" applies to claims that go to the "matter of punishment" and not to "the question of guilt or innocence." *Id.* at 406. This analysis is a straightforward application of the Eighth Amendment's plain text, which, just like Michigan's parallel provision, addresses "bail," "fines," and, most notably, "punishment." US Const, am VIII; Const 1963, am I, § 16 (addressing "bail," "fines," and "punishment"). In the end, however much one might like to read an actual-innocence exception into the state and federal constitutions' cruel-and-unusual-punishment clauses, neither text addresses innocence; each focuses on the separate question of punishment, a question that arises only *after* guilt has been determined.

Turning to the due-process question, the Supreme Court in *Herrera* recognized that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Id.* at 400. This conclusion makes sense in part because "[t]here is no guarantee that the guilt or innocence determination would be any more exact" in a new proceeding; "[t]o the contrary, the passage of time only diminishes the reliability of criminal adjudications." *Id.* at 403.

The Supreme Court further noted that "[t]he fundamental miscarriage of justice exception is available 'only where the prisoner *supplements* his

constitutional claim with a colorable showing of factual innocence,'" and that it "ha[s] never held that it extends to freestanding claims of actual innocence." *Id.* at 404–405 (citation omitted). In other words, the claimed error had to be a defect in the proceedings that deprived the prisoner of a fair process, and not a claim the verdict reached the wrong outcome. Thus, despite Herrera's attempts to tie his claim to due process and the Eighth Amendment, the Court recognized that "a claim of 'actual innocence' is not itself a constitutional claim." *Id.* at 404.

After this legal analysis, the Supreme Court then went further and said that even if it assumed, for the sake of argument, that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of the defendant unconstitutional," Herrera still lost because he could not make such a compelling demonstration. *Id.* at 417.

This Court thus has two ways to decide this question. It could hold that no constitutional violation occurs when a person receives a fair trial and is convicted, (1) because the Eighth Amendment and article 1, § 16 both apply by their terms only to questions of "punishment," not innocence, and (2) because "in both the federal and state systems, the constitution guarantees only a fair trial, not a perfect one," *Reed*, 449 Mich at 379.

Or, the Court could decline to answer this question here, because Swain has not even come close to making "a truly persuasive demonstration" that she is actually innocent. Instead, she simply attempts to cast doubt on the case against her, rather than proving she did not commit the crime. That is not enough to show

that she is actually innocent—that no reasonable jury would have found her guilty beyond a reasonable doubt.

In the end, the only way to treat a standalone innocence claim as a constitutional claim would be to create a substantive-due-process right—to say that even if the process is constitutionally sufficient and no error occurred at trial, a defendant has a right to a substantive outcome. But this Court has, consistent with the guidance of the U.S. Supreme Court, rightly "'been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.'" *People v Sierb*, 456 Mich 519, 528 (1998), quoting *Collins v City of Harker Heights*, 503 US 115, 125(1992). This is especially true here, where Swain has not even argued that the requirements of that doctrine have been met.

V. Swain cannot receive relief via MCL 770.1 because she is not actually innocent. (Question 6)

MCL 770.1 provides that a trial court "may grant a new trial to the defendant" if either of two standards are met: "[1] for any cause for which by law a new trial may be granted, or [2] when it appears to the court that justice has not been done." MCL 770.1. The court rule governing motions for a new trial parallels this statute by providing that a "court may order a new trial [1] on any ground that would support appellate reversal of the conviction or [2] because it believes that the verdict has resulted in a miscarriage of justice." MCR 6.431(B).

The staff comment to the rule states that "[s]ubrule (B) substantially modifies the statutory standards for granting a new trial set forth in MCL 770.1 and applied by the courts." MCR 6.431 1989 staff cmt, citing *People v Hampton*, 407 Mich 354, 372–373 (1979). The comment explains that "[a]lthough the court rule repeats in stylistically revised language the first standard, it substitutes a new second standard: 'Because [the trial court] believes the verdict has resulted in a miscarriage of justice.'" *Id.* The comment then concludes that "[w]hat substantive difference, if any, exists between the new standard and the former standard is left to be addressed by case law." *Id.*; see also *People v Redd*, 486 Mich 966, 974 n 16 (2010) (Marilyn J. Kelly, C.J., dissenting) (comparing the second standards and describing them as "similar[]").

Taken together, the comment and the statute suggest that this Court, if asked to interpret MCL 770.1's second clause, could interpret it to address miscarriages of justice, which means the statute could provide the source of authority for the Court's caselaw (i.e., *Cress*) allowing the grant of a new trial based on newly discovered evidence independent of any error in the proceedings. The context of MCL 770.1 further shows it can be used to consider newly discovered evidence, because the very next section cross-references the rule about allowing new testing of DNA evidence. MCL 770.2(1) ("Except as provided in section 16"); MCL 770.16 (addressing DNA evidence). In fact, the Michigan Court Rules themselves are predicated on the existence of a freestanding claim; otherwise, there would be no reason for MCR 6.502(G)(2) to have a special category for newly discovered

evidence but not to have one for trial errors. And MCL 770.1 is a statute that can provide the authority that the court rules assume for granting a new trial.

A post-appeal motion for a new trial must be implemented by passing through MCR 6.508(D), with all its attendant limitations. See, e.g., MCR 6.502(G) (limiting successive motions). This is evident both from the statutory provisions and the Michigan Court Rules. The statute, MCL 770.2, provides a 60-day window after entry of judgment in which to bring a motion for a new trial, but then it says that that limitation may be overlooked "for good cause shown." MCL 770.2(4). Similarly, MCR 6.431 sets out a time period—a different one (six months of entry of judgment), which flows from this Court's authority over procedural rules—but then provides that "[i]f the defendant is no longer entitled to appeal by right or by leave, the defendant may seek relief pursuant to the procedure set forth in subchapter 6.500." MCR 6.431(A)(4). So a defendant bringing a late motion for a new trial is funneled into subchapter 6.500, which means he must establish that he is entitled to relief. And in the context of an actual-innocence claim based on new evidence, that means he must prove that it is more likely than not that no reasonable jury would convict him beyond a reasonable doubt.

While addressed above, this last point deserves repeating. The fourth prong of *Cress* requires that "the new evidence makes a different result probable on retrial." *Cress*, 468 Mich at 664. As the U.S. Supreme Court has made clear, when a court is analyzing an actual-innocence claim, "the analysis must incorporate the understanding that proof beyond a reasonable doubt marks the boundary between

guilt and innocence." *Schlup*, 513 US at 328. In the context of an actual-innocence claim, then, to prove that a different result would be probable on trial requires the convicted defendant (who is no longer entitled to the presumption of innocence) to prove that "no reasonable juror would have found the defendant guilty." *Id.* at 329.

As discussed above, Swain is not entitled to relief under this standard, because the evidence she relies on does not satisfy *Cress*'s four-part test.

CONCLUSION AND RELIEF REQUESTED

A defendant seeking relief from judgment on a theory of actual innocence must establish to a more-likely-than-not level that no reasonable jury could have found her guilty beyond a reasonable doubt. Swain cannot satisfy this requirement. And Swain's *Brady* claim fails because she knew about the evidence that she asserts was suppressed.

Accordingly, the Attorney General respectfully urges the Court to affirm the denial of Swain's successive motion for relief from judgment.

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